APPENDIX A

The Dissenting Opinion of Van Voorhis, J. in the New York Court of Appeals

Van Voorhis, J. (dissenting):

As conditional vendors of commercial motor vehicles, appellants' property in these vehicles has been destroyed through subordination to accumulated highway use taxes (Article 21 of the Tax Law) accruing with reference to other vehicles owned and operated by the conditional vendee, in many instances prior to delivery to the vendee of appellants' automotive equipment. Appellants could not have ascertained the tax liabilities of the vendee prior to sale, even if the books of the State Tax Commission had been open to them, inasmuch as the vendee had filed incorrect tax returns. A similar situation existed during the periods of time while appellants' motor vehicles were in the possession of the conditional vendee. Highway use taxes accruing with respect to the vehicles sold by appellants can be given priority over appellants' property interests in those vehicles, but it seems to me to constitute deprivation of property without due process of law and denial of the equal protection of the laws, to subject the recognized property interest of a conditional vendor to taxes which have accrued against the conditional vendee without reference to these vehicles, and in substantial part, before they were delivered to the conditional vendee or even manufactured. In voting to modify the judgment appealed from in these respects, I do not imply that some of the objects of this part of Article 21 of the Tax Law could not be realized by legislation giving effect to legitimate property rights of conditional vendors under such circumstances.

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Judgment affirmed. No opinion; all concur except Van Voorhis, J., who dissents in an opinion.

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APPENDIX B

THE OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

The parties have submitted this controversy upon a stipulated statement of facts pursuant to Section 546 of the Civil Practice Act. Plaintiffs ask for judgment that the tax lien priority asserted by defendants under Article 21 of the Tax Law (Highway Use Tax Law) be declared unconstitutional and invalid, and that certain bonds filed by them, under protest, to secure payment of such liens be cancelled and returned.

In 1953 International Harvester Company and Brockway Motor Company, Inc., sold three tractors to Eastern Cartage and Leasing Company, Inc. (herein referred to as Eastern), a carrier subject to the tax imposed by Article 21. The carrier owned at least fifteen motor vehicles as defined in the article. In each sale the vendor took a valid conditional sales agreement as a portion of the purchase price. Each vehicle became subject to Article 21. The conditional sales agreements pertaining to the two sales by International Harvester Company were duly assigned to plaintiff International. Plaintiff Brockway held the sales agreement taken by it. Eastern defaulted in making payments on all of the contracts and the several tractors were repossessed.

About April 21, 1954, defendants asserted that a lien in the amount of $3,698.04 attached to each of the three motor vehicles above mentioned. Such lien included all unpaid taxes, penalties and interest due from Eastern, including, in addition to taxes incurred as the result of the operation of those three vehicles, (a) taxes incurred by Eastern as the result of the operation of other vehicles purchased from plaintiffs and other vendors, (b) taxes for periods both prior and subsequent to the purchase of the three specified vehicles from these plaintiffs, (c) taxes for periods prior to plaintiffs' repossession of the three vehicles assessed prior to the repossession, (d) taxes for periods prior to repossession assessed after such repossession, and (e) taxes subsequent to the repossession of the vehicles by International. The Brockway truck remained in the possession of that company. International sold its tractors to third parties. Plaintiffs have been permitted to file bonds to obtain the release of the trucks from the liens.

This court affirmed the validity of Article 21 in *Mid-States Freight Lines, Inc. v. Bates* (279 App. Div. 454, *aff'd.* without opinion, 304 N. Y. 700, *cert. den.*, 345 U.S. 908). This controversy involves the application of the lien priority imposed by section 506 thereof.

Section 505 requires every subject carrier to file with the tax commissioner "on or before the twentieth day of each month a return for the preceding calendar month during which any vehicular unit was operated in this state * * *." Section 506 directs that each carrier shall pay the required tax at the time of filing the return and provides that "The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit."

The sum of plaintiffs' contention is that such lien priority denies them the equal protection of the law, subordinates their liens, and takes their property without due process unreasonably and arbitrarily. They assert that this is done to satisfy Eastern's tax obligation to pay for highway use by its other vehicles, which includes the tax obligation which had accrued before Eastern purchased and used plaintiffs' vehicles and a similar obligation accruing after the repossession of the vehicles by plaintiffs. We believe that the basic issue here is, as defendants argue, whether the State may secure its prerogative right to the payments of its taxes by making that right paramount to plaintiffs' security for their private debts. The other matters discussed relate themselves to that issue.

The prerogative right of priority of payments of debts due it from an insolvent over those due private creditors exists in the State as the successor of the Crown. The common law gave the king such preference. By virtue of our 1777 Constitution that part of the common law continued to be the law of this State. Later Constitutions have, in effect, retained that provision. The priority arises and exists independently of statute. (*Matter of Carnegie Trust*

Company, 206 N. Y. 390, 396, 397; *Matter of Gruner*, 295 N. Y. 510, 522, 523; *Marshall* v. *New York*, 254 U.S. 380, 382-384.) "The only changes of the right made by statute have been by way of enlarging its scope in certain cases. Thus, while by the common law of England * * * the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of New York extended the prerogative right so as to give certain taxes priority over prior encumbrances. An extension of this nature is found in Section 197 of the Tax Law * * *. By reason of that provision the annual franchise tax takes priority over encumbrances on the corporate property." (*Marshall* v. *New York*, *supra*, pp. 383, 384.)

The power to declare the lien of the tax paramount to all prior liens and encumbrances and to the rights of a holder of the legal title of the motor vehicle is beyond question. It is not unreasonable or arbitrary to fix upon the carrier's motor vehicles as subject of the lien. That provision is a corollary to and a necessary implementation of the mechanics of a fundamental right of priority.

The tax is imposed on the carrier as he avails himself of the use of the State's highways. It is determined by the extent of that use, irrespective of the number of trucks employed. If he fails to pay the tax, recourse may be had to his property, a common and recognized procedure. Sound reason justifies the method of enforcing the payment of the tax adopted in this statute. It could well happen that trucks constitute the sole tangible resources of a carrier. The nature of the ownership and possession of trucks is transient. It would be neither safe, practicable nor reasonable to apportion the lien of an unpaid tax on the basis of each of several vehicles' actual use of the highway. Such a prorating or subdivision is no more to be expected than where a state seeks to collect an income tax from a non-resident by enforcing payment of the tax and considering his property and business interests in the state as a single entity in order to enforce payment of the tax by lien thereon. (*Shaffer* v. *Carter*, 252 U.S. 37, 59.) In that case, adverting to the probability of changes in the units of the individual taxpayer's property and business, Mr. Justice Pitney said, "The entire jurisdiction of the state over appellant's property and business and the income he derives from them * * * is a jurisdiction in rem; and we are clear that the state acted within its lawful

power in treating his property interests and business as having *both unity and continuity.* (Emphasis supplied.)

Plaintiffs' contention of the invalidity of the statute because it has no provision for notice of assessment of tax deficiencies and provides for seizure and sale of vehicles without notice (Section 511; Subds. 3) to parties situated as are plaintiffs ties into their criticism of the statutory secrecy accorded returns required by the statute (Section 514).

As a basic proposition every presumption is in favor of the validity of a statute. The tax imposed by Article 21 has been determined to be a valid tax: (*Mid-States Freight Lines, Inc.*, v. *Bates, supra.*) The power of the State to establish priority for tax debts due it cannot be questioned. Entire exactitude in the application of taxes, while a desirable goal, cannot always be attained. Here the plaintiffs point out dire possibilities of unequal exactions. On the record before us we cannot say that the plaintiffs' trucks constitute the sole fund from which Eastern's tax liability may be satisfied in the event Eastern cannot pay its own debt. It does not indicate whether the lien of the tax has been asserted against other motor vehicles of Eastern. It does not indicate that Eastern is insolvent or in receivership, though that might be a reasonable assumption.

In any event the unconstitutionality of a law is not to be determined solely on the ground that some hardship may result from its application. (*New York Rapid Transit Corp.* v. *City of New York*, 275 N.Y. 258, 265, 266.) In measuring its validity it is not reasonable to assume that the tax authorities will enforce it in such a manner as to produce uncalled-for hardship or inequity. Conversely, Mr. Justice Holmes has said (*Gast Realty & Investment Company* v. *Schneider Granite Company*, 240 U.S. 55, 58, 59), "But * * * if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The parties are in proper agreement in one respect. The law does not bar a conditional vendor from repossessing a motor vehicle subject to the State's lien or impose a lien on such a chattel for taxes accruing after its repossession.

It is urged that the assertion of the paramount lien will

raise obstacles to the widespread commercial dealings in motor trucks. That is not sufficient to divest the State of the exercise of its power. Some of the problems suggested by plaintiffs in this respect related to the "secrecy" proceedings could be solved by administrative action or by suitable legislation for furnishing information of tax liabilities and amounts thereof to persons dealing in trucks.

The judgment should be granted to defendants in accordance with the submission, except as to taxes accrued after repossession of the respective trucks by the plaintiffs, without costs.

Judgment granted to the defendants according to the submission, except as to taxes accrued after repossession of the respective trucks by the plaintiffs, without costs.

Settle the form of judgment on notice.

APPENDIX C

NEW YORK TAX LAW, ARTICLE 21, SECTIONS 503 AND 506

§ 503. IMPOSITION OF TAX

In addition to any other tax or fee imposed by law, there is hereby levied and imposed a highway use tax for the privilege of operating any vehicular unit upon the public highways of this state. Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both. Such tax shall be based upon the gross weight of each vehicular unit and the number of miles it is operated on the public highways in this state except as hereinafter provided. The tax for each such vehicular unit shall be computed by multiplying the number of miles operated on the public highways in this state by the appropriate weight group tax rate as it appears in the following table. When a vehicular unit is operated without any load whatsoever, the carrier shall pay the tax imposed by this section only upon the actual weight of the vehicular unit for the mileage such unit is operated without load or cargo, computed at the appropriate weight group tax rate in the following table: [Table omitted]

§ 506. PAYMENT OF TAX

At the time of filing a return, as required by this article, each carrier shall pay to the tax commission the tax imposed by this article for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed. The tax commission may grant a reasonable extension of time for paying the tax whenever good cause exists.

The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit.

REMITTITUR. December 31, 1954

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of December in the year of our Lord one thousand nine hundred and fifty-four, before the Judges of said Court.

WITNESS,

The HON. EDMUND H. LEWIS, Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

No. 250

INTERNATIONAL HARVESTER CREDIT CORPORATION & ANO.,
Appellants,

vs.

ALLEN J. GOODRICH, & ORS., constituting the State Tax Commission of the State of New York, *Respondents.*

BE IT REMEMBERED, That on the 25th day of August in the year of our Lord one thousand nine hundred and fifty-four, International Harvester Credit Corporation & ano., the appellants in this cause, came here unto the Court of Appeals, by DeGraff, Foy, Conway & Holt-Harris, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Allen J. Goodrich, & ors, constituting the State Tax Commission of the State of New York, the respondent, in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John T. DeGraff, of counsel for the appellants, and by Mr. Henry S. Manley, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof; &c.

S/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, December 31, 1954.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

S/ RAYMOND J. CANNON
Clerk

(SEAL)